CONSOLIDATION COAL CO.

IBLA 87-401 Decided November 8, 1989

Appeal from a decision of the Colorado State Office, Bureau of Land Management, denying protest to readjustment of preference-right coal lease and providing for readjustment. C-093713.

Reversed.

1. Coal Leases and Permits: Readjustment--Coal Leases and Permits: Suspension of Operations and Production

Where operations and production under a coal lease issued prior to Aug. 4, 1976, are suspended during the initial 20-year period of the lease, pursuant to sec. 39 of the Mineral Leasing Act, as amended, 30 U.S.C. § 209 (1982), the running of the 20-year period is suspended during the period of the suspension.

APPEARANCES: Brian E. McGee, Esq., Denver, Colorado, for appellant; William R. Murray, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Consolidation Coal Company (Consolidation) has appealed from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated February 27, 1987, denying its protest of the readjustment of preference-right coal lease C-093713 and providing for readjustment.

Effective June 1, 1967, BLM issued preference-right coal lease C-093713 to K. W. Miller pursuant to the Mineral Leasing Act, as amended, 30 U.S.C. §§ 181-287 (1964). In consideration of the payment of rental and royalty and observance of the other conditions of the lease, the lessee was granted the exclusive right to mine all coal in 2,517.98 acres of land situated in Rio Blanco County, Colorado.

At the time of issuance of the lease, section 7 of the Mineral Leasing Act, 30 U.S.C. § 207 (1964), provided that coal leases would be

> for indeterminate periods * * * and upon the * * * condition that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the time of the expiration of such periods.
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> Accordingly, section 3(d) of the lease expressly reserved to the United States the
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> right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period.

The lessee's record title interest in the lease passed by several mesne assignments to Consolidation, which acquired that interest effective September 1, 1972. On April 1, 1975, Consolidation notified BLM that it was engaged in exploration operations prior to developing a mining plan with respect to various leases, including the subject lease.

On August 4, 1976, Congress enacted the Federal Coal Leasing Amendments Act of 1976 (FCLAA), P.L. 94-377, 90 Stat. 1083 (1976). Section 6 of FCLAA, P.L. 94-377, 90 Stat. 1087 (1976), amended section 7 of the Mineral Leasing Act, thereby changing the term of coal leases from indeterminate to "twenty years and for so long thereafter as coal is produced annually in commercial quantities from th[e] lease," and providing for readjustment at 10-year intervals. In addition, Congress provided that "[a]ny lease which is not producing in commercial quantities at the end of ten years shall be terminated." Id.

Effective December 22, 1976, BLM promulgated 43 CFR 3500.0-5(f)(2) (1977), which stated that, in the case of leases issued before August 4, 1976, production in commercial quantities was required prior to June 1, 1986. BLM subsequently informed Consolidation by notice dated September 9, 1977, that it was required to produce coal in commercial quantities by June 1, 1986, in accordance with that regulation. 1/

By notice dated June 7, 1985, BLM notified Consolidation that the instant lease would become "subject to readjustment" on June 1, 1987, i.e., 20 years after the effective date of the lease, and, furthermore, that "the terms and conditions of the [lease] will be readjusted."

Before any further action was taken by BLM to readjust the terms and conditions of the subject lease, Consolidation filed an application for a suspension of operations and production under the lease on June 3, 1986,

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1/ The regulation was subsequently republished as part of coal management regulations (44 FR 42610 (July 19, 1979)) and eventually deleted (47 FR 33133 (July 30, 1982)).

pursuant to section 39 of the Mineral Leasing Act, as amended, 30 U.S.C. § 209 (1982), and 43 CFR 3483.3(b). Section 39 of the Mineral Leasing Act authorizes the Secretary of the Interior, in the interest of conservation, to suspend operations and production under a coal lease, in which event "any payment of acreage rental or of minimum royalty prescribed by such lease likewise shall be suspended during such period of suspension of operations and production * * * and the term of such lease shall be extended by adding any such suspension period thereto." 30 U.S.C. § 209 (1982).

In its application, Consolidation explained that a suspension was necessary because mining operations were effectively precluded during BLM's consideration of Consolidation's preference-right coal lease application (C-0126998) for an adjacent tract of land containing a common coal seam, which consideration included preparation of an environmental impact statement (EIS), where economic development of the subject land was not feasible except in conjunction with the adjacent tract. In addition, Consolidation stated that a suspension was justified where mining operations were directly precluded during preparation of the EIS which was addressing the environmental consequences of mining both the subject land and the adjacent tract. Consolidation argued that such a suspension should be retroactive to February 10, 1983, which was the date BLM announced its intention to prepare an EIS.

BLM initially declined to grant Consolidation's application for a suspension of operations and production under the subject lease. However, by decision dated October 2, 1986, BLM suspended operations and production under the subject lease, recognizing that mining operations were precluded until the conclusion of preparation of the EIS and issuance of preference-right coal lease C-0126998 where Consolidation could not, during that time, obtain approval of its plan for mining both tracts of land. See Copper Valley Machine Works, Inc. v. Andrus, 653 F.2d 595, 601 n.7 (D.C. Cir. 1981); The Northern Cheyenne Tribe v. Hodel, No. CV 82-116-BLG-JFB (D. Mont. Oct. 6, 1986), rev'd on other grounds, No. 86-4389 (9th Cir. Mar. 15, 1988); Getty Oil Co. v. Clark, 614 F. Supp. 904, 910-11 (D. Wyo. 1985). However, BLM concluded that the effective date of the suspension would be February 27, 1985, which was the date BLM published notice in the Federal Register initiating preparation of the EIS, and that the suspension would remain in effect until the EIS was filed with the Environmental Protection Agency (EPA). Finally, BLM stated that "[i]n accordance with this decision, all terms and conditions of coal lease C-093713 are suspended, including the obligation to pay rental and royalty, as of February 27, 1985."

By decision dated November 12, 1986, BLM, at the request of Consolidation, amended its October 1986 decision to provide that the suspension would be effective from February 10, 1983, which was the date BLM announced its intention to prepare an EIS, until the conclusion of the 30-day waiting period following publication by EPA in the Federal Register of the notice of availability of the EIS.

Shortly thereafter, by decision dated December 1, 1986, BLM notified Consolidation of the proposed readjustment of the terms and conditions of the subject lease. BLM stated, however, that, in view of the suspension

of lease terms and conditions pursuant to section 39 of the Mineral Leasing Act, the effective date of the readjustment would likewise be suspended. Accordingly, BLM informed Consolidation that the readjusted terms and conditions would become effective "4 years and 111 days (the length of time between February 10, 1983, and June 1, 1987) after the lease suspension is terminated." Thus, the duration of the original lease terms was to be extended and the effective date of the readjusted lease was to be postponed for the entire period of time that the terms and conditions of the lease would be suspended pursuant to section 39 of the Mineral Leasing Act. Consolidation was allowed 60 days from receipt of the BLM decision to either object to the proposed terms and conditions or relinquish the lease.

On February 2, 1987, Consolidation filed a protest to the proposed readjustment of the terms and conditions of the subject lease, challenging it both as a general matter and with respect to specific terms and conditions. Consolidation principally objected to the proposed readjustment on the basis that it would either impose new terms and conditions in derogation of existing contractual rights or improperly incorporate terms and conditions derived from FCLAA and its implementing regulations in a lease originally issued prior to the enactment of FCLAA and, thus, not subject to that statute.

In its February 1987 decision, BLM denied Consolidation's protest, overruling each of the objections raised by Consolidation. BLM held generally that it had the authority to readjust pre-FCLAA leases in accordance with FCLAA and its implementing regulations and thereby alter the existing contractual arrangement. In addition, BLM concluded that the various terms and conditions to which Consolidation specifically objected either were mandated by statute or regulation or were "necessary for proper administration of Federal resources" (Decision at 10).

However, BLM's February 1987 decision amended its December 1986 decision to provide that the subject lease would be readjusted effective June 1, 1987, rather than at the expiration of 20 years plus the suspension period. BLM explained that the amendment was necessary in order to bring the decision into conformity with the Solicitor's interpretation of the effect of a suspension on the readjustment of a pre-FCLAA lease: "The Solicitor states that coal leases with indeterminate lease terms, such as coal lease C-093713, remain subject to readjustment on the regular anniversary date even if the lease has been suspended under section 39 of [the Mineral Leasing Act] for a period of time during the previous 20 years" (id. at 2). Accordingly, BLM readjusted the subject lease effective June 1, 1987, giving Consolidation 30 days from receipt of the decision to either appeal the readjustment or relinquish the lease.

Finally, BLM's February 1987 decision provided that in the event of an appeal, with the exception of the obligation to pay rental and royalty, "all readjusted terms and conditions shall be effective pending the outcome of the appeal" (id. at 11 (emphasis omitted)). With respect to rental and royalty, BLM stated that they would continue to accrue "at the rates estab- lished in the readjusted lease" during the pendency of any appeal and be

payable with interest if the BLM decision is affirmed. 2/ Consolidation has appealed from the February 1987 BLM decision.

In its statement of reasons for appeal (SOR), appellant again challenges the readjustment of the subject lease both on a general basis and with respect to specific terms and conditions, reiterating many of the same arguments raised in its protest and in numerous other appeals by appellant and other coal lessees. Appellant contends that the readjustment of the subject lease is premature because, pursuant to section 39 of the Mineral Leasing Act and 43 CFR 3483.3(b)(1), the lease "is not subject to readjustment until 4 years and 111 days (the length of time between February 10, 1983, and June 1, 1987) after the Section 39 suspension terminates" (SOR at 8). In the alternative, appellant contends that, in view of the suspension, the readjustment should at the very least be deemed to be effective following the suspension period, as originally provided for in the December 1986 BLM decision, rather than June 1, 1987.

In its answer to appellant's SOR, BLM contends that appellant's coal lease remained "subject to readjustment on its regular anniversary date even though the lease ha[d] been suspended under section 39 [of the Mineral Leasing Act]" because the suspension could have no effect on a coal lease with an indeterminate term (Answer at 7). With an indeterminate term, BLM states that "there was nothing to extend" (id. at 3). Thus, BLM asserts that it had the right to readjust the subject lease effective June 1, 1987, despite the suspension of operations and production.

[1] Nothing in either the Mineral Leasing Act or its implementing regulations expressly governs the question of whether the suspension of operations and production pursuant to section 39 of the Mineral Leasing Act thereby suspends the 20-year readjustment interval provided for in the case of pre-FCLAA leases. Section 39 of the Mineral Leasing Act provides only that in the case of a suspension "any payment of acreage rental or of minimum royalty * * * shall be suspended during [the] period of suspension * * * and the term of [the] lease shall be extended by adding any such suspension period." 30 U.S.C. § 209 (1982). As explained in Solicitor's Opinion, 92 I.D. 293, 296-97 (1985), that statutory provision was principally intended to remedy the inequity of allowing the running of the lease term and the collection of rental and minimum royalty during the time that the lessee was denied beneficial use of the affected lease, i.e., where the lessee had "but a paper title evidencing a legal right the actual use of which is suspended." S. Rep. No. 812, 72d Cong., 1st Sess. 3 (1932). There

2/ Appellant objects to the fact that, with exception of the rental and royalty obligations, the readjusted terms and conditions are effective pending appeal. However, that accords with 43 CFR 3451.2(e), cited by BLM, which states that such terms and conditions "shall be effective pending the outcome of the appeal, unless the authorized officer provides otherwise."

was simply no consideration of the effect of a suspension of operations and production on the running of the 20-year readjustment period provided for in section 7 of the Mineral Leasing Act, which statutory provision was already in existence at the time of enactment of section 39 of the Mineral Leasing Act in 1933.

Similarly, there is no provision in section 7 of the Mineral Leasing Act as originally enacted governing the effect of a suspension of operations and production. That statutory provision simply states that a readjustment of the terms and conditions of a lease may be made "at the end of each twenty-year period succeeding the date of the lease." 30 U.S.C. § 207 (1964). However, for the purposes of resolution of the question posed herein, it is significant that there is no indication whether the 20-year period referred to meant 20 calendar years or 20 years during the term of the lease during which time the lessee had beneficial use of its lease. That meaning is by no means established. See 86 C.J.S. Time § 9 (1954); 74 Am. Jur. 2d Time, § 8 (1974).

We conclude that while Congress made no express provision for the effect of a suspension of operations and production on the running of the 20-year readjustment period, it was implicit that this period would only run during the effective term of the lease during which time the lessee had beneficial use of the affected lease. Therefore, we hold that the running of the initial 20-year readjustment period is suspended during the period of a suspension of operations and production pursuant to section 39 of the Mineral Leasing Act where the lessee is denied beneficial use of the lease during that period. Upon termination of the suspension, any period of the suspension prior to the expiration of 20 calendar years from the original effective date of the lease will be added thereto, thereby extending the readjustment period for the length of the suspension. This accords with the "obvious fairness" intended by enactment of section 39 of the Mineral Leasing Act. S. Rep. No. 812, 72d Cong., 1st Sess. 3 (1932). Moreover, it constitutes a liberal construction of section 39 of the Mineral Leasing Act, which construction is consistent with the remedial intent of this statutory provision. See Solicitor's Opinion, 56 I.D. 174, 195 (1937).

While the subject lease is between the United States and a private party, it is nevertheless a commercial transaction governed by the same principles of contract law applicable in the private context. See Rosebud Coal Sales Co. v. Hodel, 667 F.2d 949, 951 (10th Cir. 1982). As such, the lease represents a bargain struck between the parties thereto, to which both parties are bound. Part of that bargain is that the lessee will be allowed to conduct operations and production under certain terms and conditions for a specific period of time, at the end of which time the United States has the right to readjust such terms and conditions, and that, correspondingly, the United States is constrained from readjusting the terms and conditions of the lease until the expiration of the specified period.

We conclude that where a suspension pursuant to section 39 of the Mineral Leasing Act denies the lessee the ability to conduct operations and production during the designated period of time prior to readjustment, the parties thereto are entitled to the full benefits and burdens of their "bargain" by regarding the running of the 20-year readjustment period as suspended during the period of the suspension and then, upon termination of the suspension, by providing for readjustment of the lease only at the conclusion of the running of the period of the suspension prior to the expiration of 20 calendar years from the original effective date of the lease. Copper Valley Machine Works, Inc. v. Andrus, supra at 607 n.12.

During the suspension of operations and production under a lease, the lease term is "toll[ed]." Solicitor's Opinion, 92 I.D. at 296. The lease is effectively suspended as a result. As the court stated in Northern Cheyenne Tribe v. Hodel, No. 86-4389 (9th Cir. Mar. 15, 1988), the lease is "held in abeyance." It would seem to follow from this that the terms and conditions of the lease are not operative during the period of the suspension.

As appellant points out, the regulation implementing section 39 of the Mineral Leasing Act at 43 CFR 3483.3(b)(1) has for some time provided for the suspension of "all other terms and conditions" of an affected lease. See also Texaco, Inc., 68 I.D. 194 (1961). This regulatory provision was recently amended without any change in this language. See 53 FR 49986 (Dec. 13, 1988). BLM contends, however, that this language was never intended to suspend "more than the terms and conditions related to operations and production as authorized by section 39 [of the Mineral Leasing Act]" (BLM Response to Appellant's Letter and to IBLA Order (BLM Response) at 4).

We can find nothing in the language of the regulation which limits it to only certain "terms and conditions." BLM, however, states that the phrase should not be given an expansive reading because BLM never expressed such an intent, referring to the preamble to 30 CFR 211.22(b)(1) (47 FR 33188 (July 30, 1982)), the predecessor of 43 CFR 3483.3(b)(1). However, the preamble also suggests a broad reading. It states that section 39 of the Mineral Leasing Act authorizes the suspension of "the Federal lease and all of its conditions." 3/ 47 FR 33172 (July 30, 1982) (emphasis added).

Finally, BLM argues that "[i]f section 39 [of the Mineral Leasing Act] suspended all terms and conditions, Congress would have had no need to

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3/ In Solicitor's Opinion, 92 I.D. 537, 553 (1985), the Solicitor indicated that section 39 of the Mineral Leasing Act may be used to provide relief not only from the rental and royalty obligations amended by FCLAA, but also to "provide * * * relief from the other requirements added by FCLAA." As is evident herein, FCLAA affects many of the terms and conditions of pre-FCLAA leases, not just the rental and royalty provisions.

extend the lease term or to suspend rent and minimum royalty by explicit provision in section 39" (BLM Response at 4). BLM suggests that Congress thereby recognized a limitation on the effect of a suspension of operations and production to only what was expressly provided for. The argument cannot be sustained. The legislative history of section 39 of the Mineral Leasing Act indicates that Congress expressly suspended the requirement to pay rental and minimum royalty and extended the lease term in the interest of equity because these provisions were mandated by statute and, thus, were not susceptible to suspension or extension by the Secretary under existing law. See S. Rep. No. 812, 72d Cong., 1st Sess. 2-3 (1932); Solicitor's Opinion, 92 I.D. at 296-97. The fact that it was necessary for Congress to make such express provisions does not indicate that Congress either intended to limit the effect of a suspension of operations and production, or did not recognize the authority of the Secretary to affect other terms and conditions not governed by statute as a consequence of a suspension. Id.

BLM has simply provided no basis for limiting the language of the regulation providing for a suspension of all lease terms and conditions. We note that the October 1986 BLM decision approving the suspension of operations and production stated that "all terms and conditions of coal lease C-093713 are suspended" (Decision at 3).

One of the lease terms and conditions involved herein, which is the basis for BLM's intended readjustment, is the "right reasonably to readjust and fix royalties payable hereunder and other terms and conditions" at the end of 20 years from the effective date of the lease, as that right is set forth in section 3(d) of the subject lease. Accordingly, we regard that right also as necessarily suspended during the period of the suspension of operations and production, thereby rendering readjustment prior to the expiration of the suspension period premature.

We are not persuaded by BLM's reasoning in favor of its authority to readjust the subject lease while operations and production are suspended pursuant to section 39 of the Mineral Leasing Act. 4/ Relying on the language of that statutory provision, which states that, in the event of a suspension of operations and production, the "term of [a] lease shall be extended by adding any such suspension period thereto" (30 U.S.C. § 209 (1982)), and the legislative history of section 39 of the Mineral Leasing

4/ As noted supra, BLM's conclusion in its February 1987 decision that the subject lease was subject to readjustment at the expiration of 20 calendar years from the original effective date of the lease despite the suspension was expressly premised on a "Washington Solicitor's interpretation of the effect of a suspension on the readjustment of a pre-FCLAA lease" (Decision at 2). The record indicates that this interpretation was contained in a preliminary draft of what eventually became Solicitor's Opinion, M-36958 (July 14, 1988). However, the "interpretation" was ultimately not incorporated into the Solicitor's opinion, and appears only in BLM's answer herein.

Act, 5/ BLM argues that it had the authority to readjust the subject lease "on its regular anniversary date" because that date could not be extended by the suspension of operations and production where the lease has an indeterminate term (Answer at 7). 6/

It is clear that where Congress generally intended that the passage of time not count as part of the running of the lease term, such time should similarly not be charged against the running of the 20-year readjustment period provided for in the case of such leases. Simply put, this not only affords the parties that which was "originally contemplated" (Solicitor's Opinion, 60 I.D. 408, 410 (1950)), but promotes the reliability of the investment in the coal mining operation by assuring the lessee that it will be permitted to operate under the original terms and conditions of its lease for the full 20-year period, consistent with Congress' original purpose in providing for an indeterminate term in the case of pre-FCLAA coal leases (Solicitor's Opinion, 88 I.D. 1003, 1004-05 (1981)).

By proceeding with the instant readjustment, it is clear that BLM is concerned that it will otherwise run afoul of the dictates of Rosebud, supra, and its progeny, thereby waiving the opportunity to readjust the subject lease and precluding any readjustment until the conclusion of the succeeding readjustment interval, by virtue of failing to issue notice prior to the expiration of 20 calendar years from the original effective date of the lease and effecting a readjustment of the terms and conditions of the lease within a reasonable period of time thereafter. That case and its progeny stand for the proposition that a pre-FCLAA coal lease may be readjusted only so long as a notice of intent to readjust is provided to the lessee prior to the expiration of the initial 20-year period of the lease and the specific provisions of the readjusted lease are submitted to the lessee a reasonable time thereafter. See Coastal States Energy Co. v. Hodel, 816 F.2d 502, 505 (10th Cir. 1987); FMC Wyoming Corp. v. Hodel, 816 F.2d 496, 500 (10th Cir. 1987), cert. denied, 108 S. Ct. 772 (1988); Consolidation Coal Co., 86 IBLA 60, 64 (1985).

However, we perceive no conflict with the dictates of Rosebud. The right to readjust the subject lease is suspended during the period of the

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5/ BLM specifically refers to the following language in the legislative history of section 39 of the Mineral Leasing Act: "This bill also provides that the period of such suspension of operations and production shall be added to the term of the existing lease. This provision has no applicability to coal-land leases which are granted for an indeterminate time." S. Rep. No. 812, 72d Cong., 1st Sess. 3 (1932).

6/By contrast, it is BLM's position that FCLAA leases with a determinate term may have the "date for the next readjustment * * * extended by the period of suspension," even where the lease is beyond its primary term of 20 years and is being held by production (Decision at 2). See Answer at 7. We fail to see the logic of extending the readjustment interval in such circumstances where the underlying lease effectively has an indeterminate term, but not extending the readjustment interval where the underlying lease was originally issued with an indeterminate term.

suspension of operations and production, and will become effective at the conclusion of that period, even where that falls more than 20 calendar years after the original effective date of the lease. The court in Rosebud simply did not consider the question of whether the "twenty-year period" referred to in section 7 of the Mineral Leasing Act as originally enacted meant calendar years or effective years of the lease term or, moreover, the specific question faced herein of whether a suspension of operations and production thereby tolls the running of the 20-year readjustment interval in the case of pre-FCLAA coal leases.

Thus, we conclude that where BLM issues the appropriate notice prior to the expiration of the suspension period involved herein, i.e., 4 years and 111 days after the termination of the suspension, and effects the readjustment within a reasonable period thereafter, such readjustment will be "at the end of [the] twenty-year period succeeding the date of the lease" within the meaning of section 7 of the Mineral Leasing Act as originally enacted and, thus, timely under Rosebud. In this manner, BLM will be accorded the appropriate opportunity to readjust the lease at the expiration of the initial 20-year period consistent with the congressional intent that outstanding pre-FCLAA leases be brought into conformity with the provisions of FCLAA at the time of their readjustment. See FMC Wyoming Corp. v. Hodel, supra at 501.

We note that the Solicitor, subsequent to the February 1987 BLM decision, concluded that a suspension of operations and production thereby extends the 10-year period required for producing coal in commercial quantities where the production requirement is determinative of the term of a lease and, thus, is subject to extension pursuant to the express language of section 39 of the Mineral Leasing Act. Solicitor's Opinion, M-36958, supra. In accordance with that opinion, BLM recently amended 43 CFR 3483.3(b)(1) to delete the language stating that a suspension pursuant to section 39 of the Mineral Leasing Act suspends all terms and conditions of a lease "except the diligent development period." See 53 FR 49984 (Dec. 13, 1988). In its response, BLM has advocated delaying resolution of the instant appeal so that appellant might have the benefit of that amended regulation. As the rule has now been finalized, we conclude that the production requirement intended to be incorporated in the subject lease would now clearly be suspended during the suspension period under any circumstances.

In summary, we conclude that BLM lacks the authority to readjust the terms and conditions of the subject lease during the period of time that operations and production under the lease are suspended pursuant to section 39 of the Mineral Leasing Act. BLM's right to readjust the lease will not arise until the expiration of that period as defined by BLM, i.e., 4 years and 111 days after the termination of the suspension. In these circumstances, it is unnecessary to address appellant's other objections to the readjustment of the subject lease. Accordingly, we conclude that BLM's February 1987 decision denying appellant's protest to and providing for the readjustment of preference-right coal lease C-093713 must be reversed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

John H. Kelly
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge